

DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

Protest Alleging Contract Awarded was Illegal HCL 967

FILE: B-178820

DATE: July 22, 1974

MATTER OF: 1 Met-Pro Water Treatment Corporation
2 Environmental Tectonics Corporation

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DIGEST: 1. Inclusion in IFB of provision that contracting officer "may" waive initial production testing for bidders which had "previously produced an essentially identical item", when in fact no bidder was eligible for waiver, did not invalidate awarded contract in absence of showing that protester was prejudiced by erroneous provision or that bidders were bidding on unequal bases.

2. Administrative determination that change in specifications required initial production test to be conducted was not shown to be arbitrary, capricious, or without substantial basis in fact.

An invitation for bids provided for testing by the Government of samples of the contractor's product, but advised bidders that the contracting officer "may" waive the testing requirement for those firms which had "previously produced an essentially identical item." The cost to be incurred by the Government in conducting the test was taken into consideration through an IFB provision which added for evaluation purposes the sum of \$80,000 to each bid not qualifying for waiver. Information in the contracting officer's possession before the IFB was issued indicated that one potential bidder, the protester, would qualify for waiver. However, after bid opening, the contracting officer's technical advisors stated that in view of a specification change, "an essentially identical item" had never been produced, and therefore no bidder was eligible for waiver of the testing requirement. The protester would have been the low bidder had the testing

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requirement been waived for it alone. The protester argues that it was improper for the IFB to hold forth the prospect of a waiver when in fact none would be granted; that as a result of this impropriety, the contract awarded to another bidder was illegal and should be canceled; and that the procurement should be readvertised through an IFB which does not permit waiver of the testing requirement. Alternatively, the protester contends that it has "previously produced an essentially identical item" qualifying it for waiver and, therefore, it should be awarded the contract as the low evaluated bidder. The circumstances from which this protest arose are described in detail below.

3 The Defense Supply Agency (DSA), Defense Construction Supply Center ("the Center"), Columbus, Ohio, issued invitation for bids (IFB) No. DSA 700-73-B-2947 for 50 water purification equipment sets, a first article test report, technical data, and an initial production test (IPT) to be performed by the Government. 101 322 325

The IFB requires the sets to be constructed in accordance with specification MIL-W-52482C, hereafter referred to as the "C" specification. Section C of the IFB advised bidders that the Government would perform the IPT upon a set selected at random from the contractor's first production lot. However, paragraph f. of Section C provided:

"The contracting officer may waive the requirement for the testing described in specification MIL-W-52482C if an offeror has previously produced an essentially identical item. Consideration for the waiver shall include evaluation of the quality history on produced and delivered articles, evaluation of the contractor's present facilities, evaluation of the monetary consideration, and evaluation of design and performance requirement of the previous and current procurement.

"(1) Date and contract number(s) under which prior accepted item(s) was/were produced _____.

"Specification # _____"

The relationship of the IPT requirement to the evaluation of bids was described as follows in the IFB:

"For evaluation purposes, the estimated cost to the Government of \$80,000 for conducting the initial production test set forth in Section C of this Solicitation, will be added to the total price offered by all concerns.

"If it is determined that such test can be waived for certain offerors, then the costs of this test will be deducted from the total price of these offers for evaluation purposes.

"Therefore, if your concern believes it is eligible for waiver of this test, it is in your best interest to provide the information needed to establish eligibility in the space provided in paragraph f, of the IPT Provision, Section C of the solicitation."

The record shows that prior to issuance of the IFB, the contracting officer informally discussed the IPT requirement with the evaluating agency's liaison representative at the Center. The latter advised the contracting officer that one potential bidder, Met-Pro Water Treatment Corporation (Met-Pro), would qualify for waiver since an IPT was to be conducted on water purification sets Met-Pro was furnishing under an existing contract.

Bids were received from A. C. Ball Company, Met-Pro, and Environmental Tectonics Corporation (ETC). Met-Pro and ETC requested in their bids that the IPT requirement be waived in view of their previous production of water purification units. ETC had previously manufactured a 600 gallon-per-hour (gph) unit, which was smaller than the 1,500 gph unit required by the instant IFB. Met-Pro had manufactured a 1,500 gph unit to specification MIL-W-52482B (the "B" specification), which was the predecessor of the "C" specification used in the instant procurement. Additionally, Met-Pro requested waiver of certain data items and the requirement for a maintenance capability model on the basis that it had satisfied these requirements under earlier procurements.

4. The Army Troop Support Command (TROSCOM) has the responsibility for initiating action to grant waivers of IPT for these water purification units. Therefore, after bid opening, the Center formally requested TROSCOM's opinion concerning the propriety of waiving the IPT requirement for Met-Pro and ETC. The TROSCOM employee in charge of this activity has stated in an affidavit: 522

"Upon receipt of the above inquiry, my office reviewed the applicable specification MIL-W-52482C (The 'C' Specification) issued on 25 September, 1972 and compared it with the prior specification MIL-W-52482B (The 'B' Specification) issued on 2 September 1971 in as much as we had no deliveries as yet under the 'C' specification.

"We discovered there were five significant performance requirements not present in the 'B' specification as well as testing procedures for each new requirement. These requirements were:

- (a) 3.7 Transportability
- (b) 3.8 Environmental
 - 3.8.1 Operating Temperature
 - 3.8.2 Storage Temperature
- (c) 3.9 Reliability and 3.10 Maintainability
- (d) 3.17 Safety
- (e) 3.18 Human Factors

"We concluded that these performance requirements and their related testing procedures were so significant that the 'C' specification fell within the coverage of Army Material Command Regulation (AMCR) 700-34, (Attachment A). Paragraph 2a(2)(c) provides this Regulation is applicable where 'Items * * * have been altered significantly * * * resulting in modification or product improvement that will

lead to a change in the type/model series.' This regulation provides at paragraph 4a(1) for the evaluation of items to assure that their performance is up to requirements before being issued for use. It also provides at paragraph 4a(3) for the documentation of performance safety and reliability limitations. Under the guidance provided by this regulation we have concluded that it would be inadvisable to waive the IPT for this procurement for any bidder.

"After reaching this conclusion we contacted the Mobility Equipment Research and Development Center (MERDC) who prepared the specification in issue. They were also of the opinion that a waiver of IPT on this procurement would be inappropriate * * *."

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In view of this advice, the first article test report and IPT were not waived for any bidder. However, the data requirements and maintenance capability model were waived for Met-Pro. Thus evaluated, ETC was the lowest bidder at a price of \$1,017,094.69 and Met-Pro was the second low bidder at \$1,086,962.78. The criticality of the application or waiver of the \$80,000 IPT bid evaluation factor is shown by the difference of \$69,868.09 between these two bids. If the evaluation factor is added to both bids, as it was in fact, or if it is waived for both bids, ETC is the low bidder. However, if the evaluation factor is applied to ETC and waived for Met-Pro, the latter would become the low bidder.

Initially, both ETC and Met-Pro filed protests with our Office in which each asserted that it alone was entitled to the benefit of a waiver of the IPT evaluation factor. ETC contended that its prior manufacture of 600 gph units, qualified it for waiver of the IPT, and that if a waiver were granted only to Met-Pro, competition would be unduly restricted. ETC withdrew its protest upon being advised that a waiver would be granted to neither firm and that ETC was to be awarded the contract.

Conversely, Met-Pro contended that ETC's 600 gph unit was so dissimilar from the item being procured that it did not furnish a basis for waiver of the IPT, and further, that Met-Pro's 1,500 gph unit previously produced under the "B" specification was "essentially identical" to the item now being procured, thereby entitling Met-Pro to a waiver of the IPT.

After the contract was awarded to ETC, Met-Pro filed suit in the United States District Court for the District of Columbia, and obtained a temporary restraining order prohibiting the Government from proceeding with the contract. The order was vacated upon its expiration and the Court refused to grant a preliminary injunction. 748

Apparently since the contract had been awarded and since the Court had refused to grant a preliminary injunction, Met-Pro dismissed its complaint, without prejudice, by stipulation which recited that "certain courses of action have practically rendered moot the dispute." In view thereof, our Office did not develop the protest further. However, Met-Pro subsequently advised us that it did not regard the protest as moot, in view of ETC's alleged unsatisfactory and untimely performance. In the absence of a judicial determination on the merits, we have proceeded with our consideration of Met-Pro's protest.

Met-Pro first alleges that it was improper for the Center to have indicated in the IFB that waiver of the IPT was possible when, in fact, no bidder would qualify for waiver. It is argued that this deficiency rendered illegal the award to ETC; that the latter's contract should be canceled; and that the procurement should be readvertised under an IFB not providing for waiver of the IPT. Met-Pro claims to have been prejudiced in that it priced its bid in anticipation of receiving a waiver of the IPT, and it asserts that it might have bid differently had it known it was not to enjoy the competitive advantage of a waiver.

Armed Services Procurement Regulation (ASPR) 1-1903(a) provides in part:

"(a) The solicitation for a fixed-price type contract which is to contain a requirement for first article approval shall inform bidders or offerors that where supplies identical or similar to those called for have been previously furnished by the bidder or offeror and have been accepted by the Government, the requirement for first article approval may be waived by the Government. * * *

* * * * *

"(iii) If the Government is to be responsible for first article testing, the cost to the Government of such testing shall be a factor in the evaluation of the bids and proposals to the extent that such cost can be realistically estimated. This estimate shall be documented in the contract file and clearly set forth in the solicitation as a factor which will be considered in evaluating the bids or proposals."

However, ASPR 1-1903(b) states that "Where it is known that first article approval will be required of all bidders or offerors, the provisions of (a) above shall not apply." "First article" includes by definition "initial production samples." ASPR 1-1901(a).

The procuring agency observes that inclusion of the waiver provision in the IFB was appropriate in light of the information originally furnished the contracting officer. This information later was shown to have been erroneous, and the agency concedes that viewed in retrospect, the solicitation should not have contained a waiver provision.

We do not believe, however, that the inclusion of the waiver provision in the solicitation provides a legal basis for questioning the validity of the award to ETC. In our view, the inclusion of the provision did not prejudice Met-Pro in the submission of its bid nor did it place bidders upon an

unequal competitive basis. Met-Pro may have harbored the hope that it would enjoy the competitive advantage of being the sole bidder for whom the IPT would be waived. However, that result was not assured by the solicitation, which merely provided that the contracting officer "may" waive the testing requirement "if an offeror has previously produced an essentially identical item" and after consideration of several factors including "evaluation of design and performance requirement of the previous and current procurement."

Alternatively, Met-Pro argues that it has in fact "previously produced an essentially identical item" and therefore qualifies for waiver of the testing requirement. As indicated above, the "C" specification contains the following requirements not present in the "B" specification which governed Met-Pro's prior production:

"3.7 Transportability. The water purification unit shall be capable of withstanding the shock and vibration stress encountered during transportation.

"3.8 Environmental.

"3.8.1 Operating temperature. The water purification unit shall perform as specified in any ambient temperature from plus 110° F. to minus 25° F.

"3.8.2 Storage temperature. The water purification unit shall not be damaged by storage at ambient temperatures from plus 160° F. to minus 30° F.

"3.9 Reliability. The specified mean-time-between-failure (MTBF) of the water purification unit and ancillary equipment shall be 200 hours when tested as specified in 4.6.2.8.

"3.10 Maintainability. Each maintenance assembling and disassembling operation performed as a result of testing in

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accordance with 4.6.2.9 shall be accomplished by not more than two men using common tools furnished with the water purification unit. The ratio of manhours of maintenance required to the hours of operation shall not exceed 0.08. A maintenance schedule shall be furnished prior to start of any testing.

"3.17 Safety. A grounding system shall be incorporated to insure safety from static electricity.

"3.18 Human factors. The characteristics of the water purification unit shall provide for operation by personnel in all type clothing, and shall be designed in compliance with section 4 of MIL-STD-1472."

Section 4 of the "C" specification prescribes a series of tests to be performed upon a sample set to assure that these requirements are met.

The administrative position is that as a result of these new requirements, a unit built to the "B" specification would not be "essentially identical" to one built to the "C" specification, thereby precluding a waiver of the initial production test. We have stated that the decision as to whether or not to waive such testing " * * * is essentially an administrative function, and unless the contracting officer's determination that samples should not be waived is shown to be arbitrary, capricious, or without substantial basis in fact, it will not be disturbed by this Office." 46 Comp. Gen. 123, 127 (1966). In view of the inclusion in the "C" specification of new performance requirements, we are unable to conclude that no reasonable basis existed for the contracting officer's decision to require the IPT.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States